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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY WILLIAM THOMSON, Defendant and Appellant.	A112199 (Napa County Super. Ct. No. CR104181)

Anthony William Thomson appeals from an order revoking probation. His sole claim is that in imposing sentence the trial court failed to exercise informed discretion, and that the matter should be remanded to enable the court to so do. We reject the claim and shall affirm the judgment.

PROCEEEDINGS BELOW

On July 31, 2001, an information was filed by the district attorney of Napa County charging appellant with two counts of committing a lewd act on a child under the age of 14, a felony. (Pen. Code, § 288, subd. (a).) Although appellant was between the ages of 15 and 17 when the alleged acts took place, he was charged in adult court after a finding he was unfit to be tried in juvenile court. (Welf. & Inst. Code, § 707.) Appellant pleaded no contest to contributing to the delinquency of a minor, a misdemeanor (Pen. Code, § 272), in exchange for dismissal of both felony counts. On June 11, 2002, the court suspended imposition of sentence.

On February 17, 2004, the court summarily revoked appellant's probation based on the allegation that he had been terminated from the Sex Abuse Services Program, which he was required to attend as a condition of probation. After appellant admitted the violation, the court revoked and reinstated probation with modified conditions.

On August 10, 2004, appellant's probation was again revoked, this time for allegedly being under the influence of a controlled substance. (Health & Saf. Code, § 11550, subd. (a).) Appellant admitted the allegation and his probation was again revoked and reinstated under the original terms and conditions.

On April 20, 2005, the district attorney moved to revoke appellant's probation for a third time, alleging he had been driving on a suspended license, that he had failed to have proof of insurance, and that his registration had expired, all misdemeanors. (Veh. Code, §§ 14601.1, 16028, 4000, subd. (a)(1).) Probation was summarily revoked on April 25, 2005, and appellant thereafter admitted the allegations. On May 18, 2005, the court imposed fines for the Vehicle Code violations in the total amount of $2,620.[1] With respect to two of the Vehicle Code violations, sentence was suspended, and appellant was placed on two years of summary probation. With respect to the remaining Vehicle Code violation, appellant was sentenced to a week in jail with credit for one day actually served.

Sentencing on the original offense of contributing to the delinquency of a minor took place on October 13, 2005. Probation on that offense was terminated and appellant was sentenced to serve a year in county jail with credit for 133 days previously served and conduct credit of 66 days, for total credits of 199 days;[2] with the credits, appellant was required to serve 166 days in county jail.

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[1] The record is unclear as to whether the total amount of the fines imposed on appellant was $2,620, as at the sentencing hearing in October 2005, defense counsel stated that fines in the total amount of $4,294 had been imposed on appellant. This issue is not material to this appeal.

[2] Due to uncertainty in the record before the trial court regarding the actual amount of time appellant previously served, the court ordered the probation department

Appellant filed a timely notice of appeal on November 28, 2005. The court stayed imposition of sentence pending appeal, and appellant is at liberty on his own recognizance.

FACTS

Appellant's underlying offense came to light during a child molestation investigation in 2001. As described in the probation report, the nine-year-old victim reported that for a two-year period she orally copulated several male juveniles, one of whom was appellant. At the time, appellant was between 15 and 17 years old, the others were between the ages of 12 and 14. The victim stated that, at appellant's request and on several occasions, she orally copulated him and displayed her genitals. During one of the incidents, appellant licked her vaginal area. Appellant denied he orally copulated the victim or that she orally copulated him. He said that on one occasion the victim grabbed his clothed genital area and he pushed her away, telling her to "knock it off."

An unidentified witness was told by the victim that appellant was the first person to approach her for oral sex, and that he had digitally penetrated her vagina. According to the witness, the victim was very specific, indicating appellant had used his ring and little fingers to insert into her vagina. This initial encounter took place at her father's house in American Canyon. When appellant asked to see her "pussy," she said "no," but ultimately complied due to his persistence. Appellant then pleaded with her to "lick his dick," and she eventually did so for about 30 seconds. The victim told a probation officer that, after her initial encounter with appellant, she later became sexually involved with four other male juveniles, all of whom, like appellant, were friends of her brother.

The probation report states that at the time of his initial offense appellant had no prior criminal history.

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to conduct a "time credits study" to determine the correct amount of credit appellant was entitled to receive. Appellant does not raise the issue on this appeal.

DISCUSSION

At the time he was sentenced on October 13, 2005, appellant's counsel emphasized that more than four years had passed from the filing of the original information and the sexual conduct described in the information had occurred nearly seven years earlier. Appellant, who was now 24 years of age, had successfully participated in several diversion programs relating to sexual offender treatment and alcohol and drug abuse, even though alcohol and drug use was not a factor in his offense. Counsel also pointed out that, at about the time of the offense, appellant had been in an automobile accident and suffered an injury that prevented him "from maintaining . . . mental maturity past the age of about 12 years old." For these reasons, counsel argued, appellant should be given a sentence shorter than the 166 days remaining on his sentence.

Counsel also emphasized that appellant's four codefendants, who at the time of the offenses originally charged were between the ages of 12 and 14, were all diverted under the provisions of Welfare and Institutions Code section 654[3] "and were off in six months and everything was done and fine and they walked away. [Appellant] was the only one that went on to adult court." Counsel's position was that appellant should not be sentenced more severely than his codefendants. The district attorney objected, claiming that "[w]hat happened in the juvenile case is confidential and should not be discussed." Defense counsel responded that she had not mentioned the names of the other juveniles and "I am giving out no confidential information except that four juveniles that were involved in the underlying incident got less than him. [¶] There's nothing confidential in that statement and the law allows this Court to take into consideration absolutely anything when sentencing him. So you can consider the fact that four unnamed juvenile defendants got nothing [except] . . . 654 informal probation."

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[3] This statute authorizes a probation officer, "in lieu of . . . requesting that a petition be filed by the prosecuting attorney," and "with the consent of . . . the minor's parent," to "delineate specific programs of supervision for the minor, for not to exceed six months, and attempt thereby to adjust the situation which brings the minor within the jurisdiction of the court." (Welf. & Inst. Code, § 654.)

The district attorney objected and moved to strike defense counsel's representations regarding the sentences of appellant's codefendants on the ground that "those are confidential matters." The trial court sustained the objection and struck "any reference to any juvenile sentence in this matter or disposition."

The district attorney argued against any reduction in the indicated sentence, pointing out that appellant had committed numerous criminal offenses while on probation, did not successfully complete drug diversion, had not paid any of the fines that had been imposed, and continues to drive though his license had been suspended.

Before the matter was submitted for decision, defense counsel asked the court, "[c]an I confirm that this Court is refusing to take into consideration the other defendants' punishment and culpability in this matter?" The court responded: "Well, I'm refusing to take into consideration any juvenile findings that were made. That's what the Court is refusing to take into consideration."

Appellant's sole claim on this appeal is that the trial court failed to exercise "its informed discretion" in sentencing him and the matter should be remanded so that can be done. In a nutshell, appellant maintains that the trial court failed to appreciate that it had discretion to consider the sentences imposed on appellant's codefendants and failed to do so. We are unpersuaded.

To begin with, there is no indication that the trial court granted the prosecution motion to exclude defense counsel's representations about the sentences imposed on the other codefendants because it believed it lacked discretion to do so. The ruling was itself an exercise of discretion; and it was justified by undisputed evidence that appellant was older than all of his codefendants and that his offense was greater, in that he was the one who initiated the victim's sexual acts, which are apparently the reasons only he was tried as an adult. Furthermore, the trial court's explanation that it was refusing to consider "any juvenile findings that were made" does not mean it was refusing to consider the fact that the other juveniles received lesser sentences than the indicated one-year jail sentence for appellant. The probation officer's report dated May 20, 2002, which was before the court at the time of the 2005 sentencing and must be deemed to have been reviewed by

the court, stated that although the dispositions of two of appellant's codefendants, Gregory R. and Jeremy T., "could not be located," the other two, Lucas P. and Miguel R., "were both declared wards of the Napa County Juvenile Court and placed in the homes of their parents."

People v. Ruiz (1975) 14 Cal.3d 163 and *People v. Surplice* (1962) 203 Cal.App.2d 784, the two cases appellant primarily relies upon, are inapposite.

In *Ruiz*, the defendant was convicted of possession of heroin for sale, but the trial court failed to instruct that a specific intent to sell was an essential element of that offense. (*People v. Ruiz, supra*, 14 Cal.3d at p. 165.) The Supreme Court found, however, that the evidence was sufficient to sustain a conviction of simple possession and ordered the trial court to modify the conviction to provide that the defendant was convicted of simple possession. (*Id*. at p. 167.) Noting that the trial court's denial of probation had been based primarily on the erroneous notion that the defendant had been properly convicted of possession for sale, the Supreme Court held that the defendant was entitled to a new probation hearing, at which the trial court could make a new judgment relative to his fitness for probation in light of the lesser crime of which he was convicted. (*Id*. at pp. 167-168.) The holding in *Ruiz* was that, "when as in this case the sentencing court bases its determination to deny probation in significant part upon an erroneous impression of the defendant's *legal* status, fundamental fairness requires that the defendant be afforded a new hearing and 'an informed, intelligent and just decision' on the basis of the facts." (*Id*. at p. 168, quoting *People v. Surplice, supra*, 203 Cal.App.2d at p. 791.) In the present case, the trial court did not in sentencing appellant rely in any way upon "an erroneous impression of [appellant's] legal status."

People v. Surplice is also inapposite. In that case, the defendants waived their right to jury trial and were convicted after a court trial. The probation and sentencing hearing were held before a different judge, however. At the commencement of the hearing the court stated: "I can tell from the notes in the file the sentence that Judge Evans has in mind. Generally, I feel that a defendant is entitled to be sentenced by the judge who found him guilty or accepted the plea. If that is satisfactory with you, I will,

without making any pretense at evaluating this myself, just impose the sentence that Judge Evans had in mind." (*People v. Surplice, supra*, 203 Cal.App.2d at p. 790, italics added.) The Court of Appeal found that the failure of the sentencing judge to evaluate the evidence bearing upon sentencing "is an abdication of the judge's duty to exercise judicial discretion" and the sentence imposed was therefore void. (*Id*. at p. 792.) The court also found that the defendants did not waive the defect by agreeing that their request for probation and sentencing could be conducted by another judge "because the defect was one which goes to the fundamental fairness of the proceeding." (*Ibid*.) The situation in the present case is, of course, very different. As earlier indicated, the trial judge was personally aware of the relevant evidence, including the fact that appellant's codefendants—who unlike him were all tried as juveniles—received lesser sentences than he did; and was also aware that appellant's culpability was of a higher order.

The judgment is affirmed.

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Kline, P.J.

We concur:

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Lambden, J.

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Richman, J.